No. 573

In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC. ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION OF GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC. FOR REHEARING AND FOR STAY OF MANDATE

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GENERAL STEEL PRODUCTS, INC. and CROWN FLEX OF NORTH CAROLINA, INC. respectfully petition the Court to grant a rehearing to reconsider this Court's Decision issued on June 16, 1969, based on the following grounds:

1. The Decision is predicated on a position taken by the National Labor Relations Board for the first time at oral argument in the instant case (Sl. Op., p. 14, 16). The Board's new position was one which the Petitioner could not and did not anticipate. It is a far different position from that which the Board urged before this Court in its brief and under which it had heretofore proceeded in this matter. Moreover, as is fully recognized in the Decision (Sl. Op., p. 16), the Board's new position also constitutes a virtual abandonment of a doctrine which the Board had applied without exception for the past twenty years.

In view of the Board's belated and surprising change of position, the Petitioner has had no opportunity to brief its views on the Board's new approach to this Court or to argue more than superficially the merits of this position at oral argument. Petitioner respectfully submits that, were it provided with such an opportunity, it could demonstrate that the Board's new position does not provide proper rationale for issuance of card-based bargaining orders.

2. By the present Decision, the Board is granted judicial approval for the use of three "categories" of cases with respect to issuance of bargaining orders as a remedy for unfair labor practices. These are to be classified on the basis of the character of the unfair labor practices involved - "exceptional", "less extraordinary", and "minor or less ex-

tensive" (Sl. Op. pp. 36-7). None of this was briefed. We respectfully submit that more is urgently needed in the way of guidelines for decision by the Board and review by the courts. We suggest that while the Court recognizes that an election is the preferred course for determining employee desires, and is to be omitted only where employer misconduct renders a fair election impossible, the language of the Decision (Sl. Op. pp. 36-38) leaves the guiding circumstances undefined and probably conflicting. The Opinion reads (Sl. Op. p. 36-7):

> "***In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue (see n. 32, supra)."

Again on p. 38 the Opinion reads:

> "In the [Fourth Circuit cases], on the other hand, the Board did not make a similar finding that a bargaining order would have been necessary in the absence of an unlawful refusal to bargain. Nor did it make a finding that, even though traditional remedies might be able to en-

sure a fair election, there was insufficient indication that an election (or a rerun in *General Steel*) would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practices occurred***"

We respectfully suggest that these formulations of the test to be applied by the Board are not in harmony and need further clarification by this Court.* The parties had no opportunity to brief or to present their views to the Court on these rules.

Petitioner submits that, if the instant Petition were granted, the Court could clarify the standard which it intended to be applied by the Board and the court below on remand of the present case. In addition, the Court could alleviate the confusion and conflict which presently exists in this area by establishing as predictable and specific criteria as possible.

3. One of these "categories" of cases is almost entirely novel. This is the authorization to the Board to order bargaining in "exceptional" cases of "outrageous" and "pervasive" unfair labor practices *without inquiry into majority status.* (Sl. Op. p. 36) Such a power had been suggested, in dicta only, by the Fourth Circuit. *NLRB v. Logan Packing Co.*, 386 F. 2d 562, 570 (C.A. 4, 1967). But this power had never been claimed by the Board. True, the Board had previously ordered bargaining based on extensive Sec. 8(a)(1) violations in some cases, without any finding of unlawful

* Other statements of the Board's position are found at Sl. Op. pp. 16, 23-4, fn. 18, 32, 34.

refusal to bargain, but *always such orders rested upon a showing of a card majority.* (See cases cited in Sl. Op. p. 36) In the absence of proof of majority the Board had expressly rejected any such remedy as being contrary to the Act itself, which establishes majority rule as a basic principle. *J. P. Stevens Co. Inc.*, 157 NLRB 869 (1966): *Scotts, Inc.*, 159 NLRB No. 146 (1966); *Clanebach, Inc.*, 170 NLRB No. 35 (1968); *H. W. Elson Bottling Company*, 155 NLRB 714 (1965); mod. & enf. 379 F. 2d 223 (C.A. 6, 1967); see *Schwarzenbach-Huber Co. v. NLRB*, ...F. 2d ....., 70 LRRM 2805 (C.A. 2, 1969).

We suggest respectfully that this extreme departure deserves an opportunity for full briefing and argument.

4. The Decision approves the Board Trial Examiner's findings with respect to the validity of the specific authorzation cards involved herein, resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule [*Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enf. 351 F. 2d 917 (C.A. 6, 1965] and determining that the instant findings "represent the limits of the *Cumberland* rule's application" (Sl. Op. pp. 6-7, 30-1).

The Board, however, in its Petition for Certiorari, expressly disavowed that this question was in any way before this Court noting that the Board's determination in this respect "apparently played no part in the court of appeals' refusal of enforcement" (Bd. Pet. for Cert. pp. 20-1, fn. 20).[1] The merits of the Board's determination in this respect,

1. The Board also noted that this Court had denied certiorari the previous term in three cases in which "the standard by which the Board determines the validity of challenged cards" was directly involved. *National Labor Relations Board v. Crawford Mfg. Co.*, 390 U. S. 1028; *Preston Prod. Co. v. National Labor Relations Board*, 392 U. S. 906; *Bryant Chucking Grinder Co. v. National Labor Relations Board*, 392 U. S. 908.

accordingly, were not fully discussed by the parties, and although briefed by this Petitioner, this was without any Board briefing to which to reply.

The Petitioner respectfully submits that, were it permitted to brief and argue fully the card validity issue, it could demonstrate the fallacies in the Board's approach and the lack of preciseness and predicability involved in the Cumberland standard.[2]

The Court would also be enabled to determine the significance of facts, such as the extreme illiteracy of the employees involved in the present case, which it has not previously had the opportunity to consider. (App III pp. 581-2) The grant of the instant Petition would thus permit this issue to be accorded the full significance it deserves and permit the articulation, if the Court should so desire, of a more meaningful guideline than that presently invoked by the Board.

For the foregoing reasons, respondents General Steel Products, Inc. and Crown Flex of North Carolina, Inc. respectfully request that this petition for rehearing be grant-

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2. As Judge Friendly observed with respect to the considerable litigation that evolved from the Board's *Cumberland* approach: "The extensive discussion of evidence in such cases [citing circuit court decisions] . . . was necessitated by the Board's use of the wrong standard and the courts' desire to avoid a time consuming remand; once the Board adopts the proper standard, judicial review. . . . should not be substantially more difficult than under the [present Board standard]." *Bryant Chucking Grinder Co. v. NLRB.* 389 F. 2d 565 (28nd Cir. 1967) (Concurring opinion).

ed. Respondents further move the Court to stay its Mandate in this case pending consideration of this Petition for Rehearing.

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CERTIFICATE OF COUNSEL

The undersigned counsel for General Steel Products, Inc. and Crown Flex of North Carolina, Inc. does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purpose of delay and respectfully requests that it be considered.

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No. 578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

OSBORN PACKING COMPANY, INC.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

HICKS, INC.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL STEEL PRODUCTS, INC. AND CROWN FENCE OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Brief for the American Retail Federation as *Amicus Curiae* in Support of the Petition of General Steel Products, Inc. and Crown Fence of North Carolina, Inc. for Certiorari

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Brief for the American Retail Federation as Amicus Curiae In Support of the Petition of General Steel Products, Inc., and Crown Flex of North Carolina, Inc. for Rehearing

INTEREST OF THE AMICUS CURIAE *

The American Retail Federation (hereinafter referred to as the "Federation") is an organization com-

* This brief is filed with the written consent of both counsel for General Steel Products, Inc. and Crown Flex of North Carolina, Inc., and the Solicitor General of the United States, pursuant to Rule 42(2) of this Court.

posed of 77 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The Federation previously presented its views on the issues involved herein to this Court by means of an *amicus curiae* brief in Case No. 585. These issues have long been a matter of vital concern to the Federation. Indeed, the Board's varying positions in this area may well have been the product of the Federation's public expressions of such concern. The propriety of card-based bargaining orders was initially called to the attention of Congress in the Federation's testimony before the 1965 House and Senate hearings on the proposed repeal of Section 14(b) of the Act.[1] After attempting to defend its position in these hearings,[2] the Board limited *Snow & Sons,* 134 N.L.R.B. 709 (1961) to its facts in *John P. Serpa, Inc.,* 155 N.L.R.B. 112 (1965) and significantly limited the

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[1] (*Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare,* Senate, 89th Cong., 1st Sess. (1965) S. 256, *To Repeal Section 14(b) of the National Labor Relations Act,* pp. 181-185, 195, 196-198 (Committee Print); *Hearings Before the Subcommittee on Labor of the Committee on Education and Labor,* House, 89th Cong., 1st Sess. (1965). H.R. 77, H.R. 4350 and Similar Bills, *To Repeal Section 14(b) of the National Labor Relations Act,* pp. 418, et seq. (Committee Print)).

[2] Statement of Secretary Willard Wirtz, *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare,* Senate, 89th Cong., 1st Sess. (1965), S. 256, p. 5, *et seq.* (Committee Print)

Joy Silk doctrine in *Aaron Brothers*, 158 N.L.R.B. 1077 (1966). (See 37 L.W. 4536 at 4540)[3]

The present position of the Board,[4] announced for the first time during oral argument in the instant case, is quite similar in appearance to the "fair election impossible" test which the Federation had urged in its prior *amicus* brief, *with one critical difference.* The Federation had argued that such a position was of little substance without concomitant well-defined standards for its application. The Board, however, failed to propose such standards during its oral argument. As a result, the various positions which have been adopted by the Board all have in common a fatal deficiency which has been at the core of the Federation's con-

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[3] References to this citation contained herein are to *National Labor Relations Board* v. *Gissel Packing Co., Inc.* and *The Sinclair Company* v. *National Labor Relations Board*, Nos. 573, 691, and 585. October Term, 1968.

[4] We submit that this change of position was caused by the Board's realization of the validity of the "fair election impossible" test suggested by the Federation in its *amicus* brief in Case No. 585. That *amicus* brief urged upon this Court the need for standards so that the "fair election impossible" test, if properly held to replace the Board's "good faith doubt" test, would not be a mere re-phrasing of the Board's existing vacillations but rather would provide adequate uniform guidelines for the Board and the Courts of Appeals. The Federation's position in its earlier *amicus* brief amplified and restated the position taken by the Federation in testimony before the House in 1967 (*Hearings Before the Special Committee on Labor, Committee on Education and Labor*) *House*, 90th Cong., 1st Sess. (1967), H.R. 1175, *To Amend the National Labor Relations Act to Increase Effectiveness of Remedies*, pp. 383, 386-387, 393 (Committee Print)), and the Senate in 1968 (*Hearings Before the Subcommittee on the Separation of Powers of the Committee on the Judiciary*, Senate, 90th Cong., 2nd Sess., *Congressional Oversight of Administrative Agencies*, (NLRB), April 30, 1968.) See footnote 1 for reference to additional Federation testimony.

tinuing concern: They fail to establish clear, precise and reasonable guidelines by which the Federation's members, as well as other members of the public, can base their future behavior.

The interest of the Federation, in now urging that this Court grant a rehearing to reconsider its Decision of June 16, 1969 in the instant case, is predicated on the substantial and far-reaching consequences which will flow from disputed interpretations of the Court's Decision. The Federation respectfully submits that the Decision fails to resolve, and instead merely shifts to a different arena, the confusion and conflict which presently exist in the area of card-based Board bargaining orders. Such confusion and conflict will have a significant impact on labor relations in the retail industry. It is for this reason that the Federation believes it necessary to present its views before this Court in support of the Petition for Rehearing.

ARGUMENT

It is axiomatic that a regulatory agency, such as the National Labor Relations Board, must clearly delineate the specific standards by which it expects compliance from the public. The statutory mandate of any legislation is surely frustrated when the consequences of particular acts may vary substantially from day to day or are dependent on the unfettered discretion of changing tribunals.

In the area of card-based bargaining orders, past decisions of the Board have failed to abide by this fundamental precept. Frequently, critical rights of employees under the National Labor Relations Act have been determined by the shifting discretion of the

Board rather than by well-established guidelines. The public, to a great extent, has been left without adequate criteria upon which to base its conduct. Voluntary settlement of Board cases, without protracted hearings or litigation, has thus become greatly impaired[5] and appellate court calendars have become increasingly replete with card-based bargaining order cases.

The *amicus* respectfully submits that this Court's Decision fails to alleviate the present conflict and confusion in the card-based bargaining order area. It fails both because of the different, and even conflicting, standards which this Court enunciated in its Decision herein, and because the Board in its oral argument led the Court to believe it had changed its position by abandoning a doctrine which it had not only applied without exception for the past twenty years but also had argued herein in its brief.

Now, however, it appears that the Board is not following the position it represented to this Court. In *Clay City Beverages, Inc.*, 176 NLRB No. 91, (printed as Appendix A hereto) a decision made public June 19, 1969, over three months after oral argument, the Board continued to apply a "good-faith doubt" test in determining whether card-based bargaining orders should issue, and in doing so relied on *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732 (C.A.D.C.), *cert. denied*, 341 U.S. 914. The Board's decision disregards its representation

[5] The Board's last published Annual Report, for the fiscal year ending June 30, 1967, indicated that 91.7 percent of unfair labor practice cases closed were disposed of at the regional office level without litigation. Clearly, continuation of this record is dependent on establishment of sufficient standards by which the parties to future cases may reasonably determine the consequences thereof.